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Supreme Court, U.S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1990

JERRY D. SMITH, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether it was permissible to include, in a count charging a conspiracy in violation of 18 U.S.C. 371, both the objective of defrauding the United States and the objective of committing substantive offenses.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Statement | 2 |
| Argument | 5 |
| Conclusion | 15 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Blockburger* v. *United States*, 284 U.S. 299 (1932) | 11 |
| *Braverman* v. *United States*, 317 U.S. 49 (1942) | 4, 6 |
| *Dennis* v. *United States*, 384 U.S. 855 (1966) | 8, 10 |
| *Frohwerk* v. *United States*, 249 U.S. 204 (1919) | 4, 6 |
| *May* v. *United States*, 175 F.2d 994 (D.C. Cir.), cert. denied, 338 U.S. 830 (1949) | 7 |
| *Tanner* v. *United States*, 483 U.S. 107 (1987) | 8 |
| *United States* v. *Gibson*, 881 F.2d 318 (6th Cir. 1989) | 13 |
| *United States* v. *Haga*, 821 F.2d 1036 (5th Cir. 1987) | 9, 10 |
| *United States* v. *Hope*, 861 F.2d 1574 (11th Cir. 1988) | 7 |
| *United States* v. *Jerkins*, 871 F.2d 598 (6th Cir. 1989) | 14 |
| *United States* v. *Manton*, 107 F.2d 834 (2d Cir. 1938), cert. denied, 309 U.S. 664 (1940) | 7 |
| *United States* v. *Minarik*, 875 F.2d 1186 (6th Cir. 1989) | 8, 11, 12, 13, 14 |
| *United States* v. *Mohney*, 723 F. Supp. 1197 (E.D. Mich. 1989) | 14 |
| *United States* v. *Nersesian*, 824 F.2d 1294 (2d Cir.), cert. denied, 484 U.S. 958 (1987) | 7 |
| *United States* v. *Shermetaro*, 625 F.2d 104 (6th Cir. 1980) | 14 |
| *United States* v. *Thompson*, 814 F.2d 1472 (10th Cir.), cert. denied, 484 U.S. 830 (1987) | 10-11 |

Cases—Continued: Page

*United States* v. *Williams*, 705 F.2d 603 (2d Cir.), cert. denied, 464 U.S. 1007 (1983) ..... 7

Statutes and rules:

18 U.S.C. 2 ..... 4
18 U.S.C. 371 ..... 2, 4, 5, 6, 9, 12
18 U.S.C. 1006 ..... 3
18 U.S.C. 1014 ..... 2
18 U.S.C. 1343 ..... 2
26 U.S.C. 7206 ..... 12
Fed. R. App. P. 28(j) ..... 5
Fed. R. Crim. P. 8(a) ..... 6

Miscellaneous:

1 C. Wright, *Federal Practice and Procedure: Criminal 2d* (1982) ..... 5

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. 13961-13983) is reported at 891 F.2d 703.

### JURISDICTION

The judgment of the court of appeals was entered on December 4, 1989. A petition for rehearing was denied on March 6, 1990. Pet. App. 1B-2B. The petition for a writ of certiorari was filed on May 4, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Petitioner and three co-defendants were indicted for crimes related to the operation of the Queen City Savings and Loan Association (the Savings & Loan) in Seattle, Washington. Count 1 alleged a conspiracy in violation of 18 U.S.C. 371.[1] The indictment enumerated four objectives: (1) to defraud the United States and its agency, the Federal Home Loan Bank Board, by obstructing the Federal Home Loan Bank Board's function of safeguarding the integrity of savings and loan institutions; (2) to commit wire fraud upon the Savings & Loan and its wholly owned subsidiary, Queen City, Inc.; (3) to make false statements to influence the Savings & Loan; and (4) to make false entries in the books of the Savings & Loan and its subsidiary. Petitioner was also charged with 15 substantive offenses—ten counts of wire fraud, in violation of 18 U.S.C. 1343, four counts of making false statements to influence a savings and loan insured by the Federal Savings and Loan Insurance Corporation (FSLIC), in violation of 18 U.S.C. 1014, and one count of making a false entry in the

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[1] 18 U.S.C. 371 provides:

> **Conspiracy to commit offense or to defraud United States.** If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

books and records of a savings and loan, in violation of 18 U.S.C. 1006. Pet. App. 13964-13965.

Following a jury trial in the United States District Court for the Western District of Washington, petitioner was convicted on all counts except one false statement count. He was sentenced to a total of ten years' imprisonment. The court imposed a term of five years' imprisonment on the conspiracy count, to be followed by concurrent five-year terms of imprisonment on each of the wire fraud counts and the false entry count, and concurrent two-year terms of imprisonment on each of the false statement counts. He was also ordered to make restitution to the FSLIC in an amount to be determined by the district court. Pet. App. 13965-13966.

1. The evidence at trial established that, in the spring of 1982, petitioner began to exercise significant influence at the Savings & Loan. Over the course of the next several months, he engaged in a series of fraudulent transactions involving the Savings & Loan and its subsidiary. The court of appeals' opinion details three of these transactions: (1) the Can-Am scheme (Pet. App. 13968-13969); (2) the PDS skim (*id.* at 13969-13970); and (3) the Hidden Valley Joint Venture (*id.* at 13970). The evidence at trial also established two other similarly fraudulent transactions—loans to the K & S Land Company and to the Investors Housing Joint Venture. Gov't C.A. Br. 33-36. Petitioner was substantially aided in his efforts by co-defendant G. Michael Kirchoff, the president of the Savings & Loan's subsidiary. Pet. App. 13966-13969, 13980-13982.

2. Prior to trial, petitioner moved to dismiss the conspiracy count on the ground that it was duplicitous. Mot. to Dis. and accompanying Memo. (Oct. 16, 1987), C.R. 99. He contended that he could not

properly be charged in one count with conspiring both to defraud the United States (under the "defraud clause" of Section 371) and to commit offenses against the United States (under the "offense clause" of Section 371) because, in his view, the two clauses embody "two distinct types of conspiracy, defined by Congress as two distinct crimes." Mot. to Dis. and accompanying Memo. 4. He therefore urged that the count be dismissed, or that the government be required to elect one of these two clauses as the basis for prosecution. *Id.* at 6. The district court denied the motion. C.R. 147 (Jan. 29, 1988).

3. On appeal, petitioner renewed his duplicity objection. The court of appeals rejected that claim, holding that Section 371 does not create "two distinct conspiracy offenses." Pet. App. 13977. The court explained that the defraud clause "merely expands the scope of the offense by including another object of a conspiracy that might not otherwise be covered" by the offense clause. *Id.* at 13979. Relying on *Braverman* v. *United States*, 317 U.S. 49, 54 (1942), and *Frohwerk* v. *United States*, 249 U.S. 204, 209 (1919), the court held that "where conspiracy is the charge, the established rule is that a charge of conspiracy to commit more than one offense may be included in a single count without violating the general rule against duplicity. * * * [T]he defendants were properly charged with a single continuing agreement to defraud the United States and to commit the substantive offenses." Pet. App. 13979-13980.[2]

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[2] On appeal, petitioner also raised issues regarding improper jury instructions (Pet. App. 13970-13974), reliance on a civil statute (*id.* at 13974-13975), the use of 18 U.S.C. 2 (Pet. App. 13975-13976), the sufficiency of the evidence (*id.* at

## ARGUMENT

Petitioner renews his contention (Pet. 3-17) that it was improper to include in the conspiracy count both the objective of defrauding the United States and the objective of committing substantive offenses. He continues to suggest that the inclusion of both kinds of objectives in one count was duplicitous. Pet. 11. Additionally, relying on a Sixth Circuit decision that was issued after briefing in the court of appeals was completed,[3] petitioner contends that the government should not have been permitted to proceed under the defraud clause at all because his "wrongful conduct was exactly described by the specific criminal statutes that prohibit wire fraud, false statements and false [entries] in a savings and loan association." Pet. 5. Although the petition does not distinguish between the two theories that petitioner presents to this Court, the two theories rest on fundamentally different premises and have correspondingly different consequences. Petitioner's duplicity objection rests on the view that two offenses should not be charged in one count. If applicable here, the duplicity objection would require the government to charge only one of the clauses of Section 371 in any single conspiracy count.[4] Petitioner's exclusivity ob-

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13980-13982), and the length of his sentence (*id.* at 13983). The court of appeals rejected each of these objections, and petitioner does not pursue them in this Court.

[3] Petitioner informed the court of appeals of the Sixth Circuit's decision in a letter citing supplemental authorities, pursuant to Fed. R. App. P. 28(j).

[4] See 1 C. Wright, *Federal Practice and Procedure: Criminal 2d* § 142, at 469, 474-475 (1982) (" 'Duplicity' is the joining in a single count of two or more distinct and separate offenses. * * * [T]he rules about duplicity * * * do not limit

jection, in contrast, rests on the view that the defraud clause cannot be used at all, and if correct would require the government to use only the offense clause for certain Section 371 prosecutions. See Pet. 4-5, 16. In any event, whether petitioner's objection rests on the claim that the government must elect between the clauses in a particular Section 371 count, or on the claim that the government must proceed only under the offense clause, it lacks merit.

1. In rejecting petitioner's duplicity objection, the court of appeals correctly applied a basic tenet of the law of conspiracy—that a conspiracy count is not improper simply because it charges that the conspiracy had multiple unlawful objectives. In *Frohwerk* v. *United States*, 249 U.S. 204, 209-210 (1919), this Court observed that "[c]ountenance * * * has been given by some Courts to the notion that a single count in an indictment for conspiracy to commit two offenses is bad for duplicity. This Court has given it none. * * * The conspiracy is the crime, and that is one, however diverse its objects." Similarly, in *Braverman* v. *United States*, 317 U.S. 49, 53 (1942), this Court emphasized, "Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy that the statute punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one." As the court of appeals determined, the defraud clause is

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what may be joined, but are only pleading rules going to the manner of how charges are to be joined."); Fed. R. Crim. P. 8(a) ("Two or more offenses may be charged in the same indictment or information in a separate count for each offense * * *.").

simply an alternative means of committing the offense of criminal conspiracy, and its inclusion with the three objectives of committing substantive offenses thus did not render the indictment duplicitous.

Like the court of appeals in this case, other courts of appeals have also upheld indictments charging a single conspiracy with objectives of defrauding the United States and committing specific statutory offenses. See, *e.g.*, *United States* v. *Williams*, 705 F.2d 603, 623-624 (2d Cir.), cert. denied, 464 U.S. 1007 (1983); *May* v. *United States*, 175 F.2d 994, 1002 (D.C. Cir.), cert. denied, 338 U.S. 830 (1949); *United States* v. *Manton*, 107 F.2d 834, 839 (2d Cir. 1938), cert. denied, 309 U.S. 664 (1940). Like the court in this case, those courts have relied on the fundamental principle that the allegation of multiple unlawful objectives—including the objective of defrauding the United States—does not render a conspiracy count duplicitous.[5]

2. Petitioner's alternative theory—the "exclusivity theory"—is not properly presented to this Court because it was not raised before the trial court. In that court, petitioner relied only on the objection of duplicity. In his brief in the court of appeals, petitioner again raised the duplicity theory and did not raise the exclusivity theory;[6] it was only in a post-briefing

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[5] See also *United States* v. *Hope*, 861 F.2d 1574, 1578 n.8 (11th Cir. 1988) (rejecting duplicity challenge to conspiracy count which alleged objectives under both offense clause and defraud clause); *United States* v. *Nersesian*, 824 F.2d 1294, 1313 (2d Cir.) (upholding conspiracy count which alleged objectives under both offense clause and defraud clause), cert. denied, 484 U.S. 958 (1987).

[6] In his court of appeals brief, petitioner argued in addition to his duplicity objection that "the use of the defrauding clause in conjunction with the offense[] clause in Count One

letter to the court of appeals that petitioner referred, by implication, to the exclusivity theory by citing the Sixth Circuit's decision in *United States* v. *Minarik*, 875 F.2d 1186 (1989). In light of petitioner's failure to preserve the exclusivity claim in the district court, and in light of his failure to make that claim in his brief on appeal, it is not surprising that the court of appeals declined to address that theory in its opinion. Because petitioner has failed to preserve that claim below, it is likewise not properly presented for this Court's review.

In any event, the "exclusivity theory" is incorrect on the merits: there is no basis for the claim that, if a conspiracy may be prosecuted under the offense clause, the government is barred from invoking the defraud clause. In *Dennis* v. *United States*, 384 U.S. 855 (1966), this Court rejected the argument that a prosecution under the defraud clause should have been brought under the offense clause because a substantive offense prohibited the conduct at issue (the filing of false statements with the National Labor Relations Board). As the Court stated, "[t]he fact that the events include the filing of false statements does not, in and of itself, make the conspiracy-to-defraud clause of § 371 unavailable to the prosecution." *Id.* at 863-864. It is well settled, moreover, that the defraud clause "reaches *any* conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of Government." *Tanner* v. *United States*, 483 U.S. 107, 128 (1987) (internal quotation marks omitted; emphasis added). Petitioner's exclusivity theory, in contrast,

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[was] * * * unconstitutionally vague" because petitioner could have been "convicted of conspiracy for the same conduct which *caused no* pecuniary loss and which *caused* pecuniary loss." Pet. C.A. Br. 45-46.

would require conspiracies under the defraud clause not only to have that purpose, but also to meet a requirement that the offense clause be unavailable. There is no basis for adding that unwritten requirement to the specified and well-settled elements of a conspiracy under the defraud clause of Section 371.

3. Petitioner contends (Pet. 7-12) that the decision of the court of appeals in this case conflicts with decisions from the Fifth, Sixth, and Tenth Circuits. Analysis of that claim requires careful consideration of the holdings of the allegedly conflicting decisions. Although we disagree with language in two of the three decisions, the courts' holdings in those cases do not present a conflict with the court of appeals' decision in this case.

a. Petitioner suggests that the decision of the court of appeals in this case conflicts with the Fifth Circuit's decision in *United States* v. *Haga*, 821 F.2d 1036 (1987), and that *Haga* supports petitioner's duplicity claim. Pet. 11-12. In *Haga*, the defendant was indicted under the offense clause of Section 371, but he was convicted, following a bench trial, of conspiracy to defraud the United States. 821 F.2d at 1044-1045. Emphasizing that Haga was convicted "of an offense for which he was not indicted and which was not asserted during his trial," *id.* at 1046, the court of appeals reversed the conviction. The court held that it violated basic notions of due process to convict the defendant on a charge different from the charge set forth in the indictment and asserted at trial. Nothing in the holding of the court, however, suggests that inclusion of the offense clause and the defraud clause as objectives of a single conspiracy would be duplicitous.

The court's opinion in *Haga* includes the observation that the conspiracy count "must have charged

a conspiracy *either* to 'commit any offense' *or* to 'defraud the United States'; it cannot have charged both." *United States* v. *Haga*, 821 F.2d at 1043. See also Pet. App. 13976-13977 (quoting *Haga* decision). Although we believe that statement to be incorrect, it was dictum. The court noted that the indictment alleged only a conspiracy under the offense clause,[7] and that the possibility of a prosecution under the defraud clause did not emerge until the district court's decision convicting the defendant.[8] Thus, the *Haga* court's observation about whether defrauding the United States and committing a substantive offense could have been charged as separate objectives of one conspiracy was unnecessary to its holding, and does not create a conflict with the decision of the court of appeals in this case.[9]

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[7] See 821 F.2d at 1043 ("Count I of the indictment plainly charged appellant under the first clause of section 371."); *id.* at 1045 (citing "the *words* in the *body* of the indictment describing the conspiracy being charged ('conspire to commit offenses against the United States, to wit, violations of the Federal Food, Drug, and Cosmetic Act')").

[8] See 821 F.2d at 1045 ("[T]he possibility appellant would be convicted under that arm of section 371 first became evident only when the district judge found appellant guilty of felony conspiracy."); *ibid.* ("[T]he government's felony conspiracy theory relied upon at trial * * * was substantially different from the section 371 'conspiracy to defraud the United States' theory upon which the district court grounded appellant's conviction.").

[9] *Haga* furnishes no support at all for petitioner's exclusivity contention—that the defraud clause may not be used when the offense clause is available. The court specifically emphasized that "an indictment brought under section 371 may allege either or both offenses," and cited *Dennis* v. *United States*, *supra*, for the proposition that "the conduct involved in a conspiracy to defraud the United States may include

b. Petitioner also claims that the court of appeals' decision conflicts with the Tenth Circuit's decision in *United States* v. *Thompson*, 814 F.2d 1472, cert. denied, 484 U.S. 830 (1987), and that *Thompson* also supports his duplicity claim. Pet. 11-12. *Thompson* was a double jeopardy case in which the issue was whether the pre-sentence vacatur of a guilty plea to an information charging conspiracy to commit mail fraud barred a subsequent prosecution for conspiracy to defraud the United States. Citing *Blockburger* v. *United States*, 284 U.S. 299 (1932), the Tenth Circuit found no double jeopardy bar because conspiracy to commit mail fraud and conspiracy to defraud the United States require proof of different elements and thus do not constitute the same offense for double jeopardy purposes. 814 F.2d at 1476-1477. The Tenth Circuit applied settled double jeopardy principles, and its holding that a conspiracy to defraud the United States and a conspiracy to commit a particular substantive offense are separate crimes for double jeopardy purposes does not suggest that the offense clause and the defraud clause may not be included as separate objectives of a single conspiracy. The decision in *Thompson* therefore clearly does not conflict with the decision of the court of appeals in this case.

c. Finally, petitioner maintains that the court of appeals' decision conflicts with the Sixth Circuit's decision in *United States* v. *Minarik*, *supra*. He relies on *Minarik* to support his exclusivity theory, *i.e.*, his claim that the defraud clause should not have been available at all because the offense clause was applicable. See Pet. 8-10.

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actions that could also be charged as offenses against the United States." 821 F.2d at 1039.

In *Minarik*, the district court granted the defendants' motions for judgment notwithstanding the verdict following their convictions on a one-count indictment charging them with conspiring to defraud the United States by concealing transactions from the Internal Revenue Service. The Sixth Circuit affirmed. The court agreed with the district court's "disposition of the case on the facts," finding that the government had changed its theory of the case several times during the proceedings and that its "failure to specify the crime with which it charged the defendants has generated unacceptable confusion." 875 F.2d at 1187, 1190. The court then went on to discuss a "more fundamental, overriding reason" for affirmance: that the government could not properly have charged a conspiracy to defraud under Section 371 because it could have charged a conspiracy to commit a specific offense (a violation of 26 U.S.C. 7206). 875 F.2d at 1187, 1193-1196. The court declared that "an individual whose alleged wrongful agreement is covered by the offense clause (because covered by a specific offense defined by Congress), as well as arguably by the broad defraud clause, cannot be convicted or punished for both. Only by treating conspiracies to commit specific offenses (which are also arguably general frauds) exclusively under the offense clause of § 371 can multiple convictions and unnecessary confusion be avoided." *Id.* at 1193-1194.

The latter aspect of the Sixth Circuit's opinion was clearly not essential to its decision to affirm the district court's judgment, and thus may fairly be characterized as dictum. The court of appeals agreed with the district court that "[t]he Government's theory of the case evolved throughout the period from the return of the indictment through the trial," 875

F.2d at 1189; that "[t]he changing theories of the Government's case [were] significantly dissimilar" and "presented defendants with a moving target as they attempted to prepare their defense," *ibid.*; that the bill of particulars itself contained "two distinct theories of the alleged crime," one of which "could not have been predicted from the indictment," *id.* at 1189, 1190; that the government "shifted its position as to the legal duty it was alleging the defendants had violated," *id.* at 1190; that "confusion * * * pervade[d] the history of [the] prosecution," *ibid.*; and that the confusion was "unacceptable." *Ibid.* The changes and ambiguities in the government's position, which the court found had deprived the defendants of fair notice, thus furnished an independently sufficient basis for affirmance of the judgment invalidating the convictions. That conclusion does not depend on a determination that the defraud clause should not have been invoked because the offense clause was available.[10]

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[10] The Sixth Circuit has subsequently cited *Minarik* in *United States* v. *Gibson*, 881 F.2d 318, 320 n.1 (1989). Gibson had been charged under both clauses of Section 371. He had successfully moved, at the close of the government's case, for a judgment of acquittal under the defraud clause and was appealing his conviction under the offense clause. The court of appeals rejected his claim that his conviction under the offense clause should be reversed. In commenting on the dismissal of the defraud clause allegation, the court cited *Minarik* as "a second reason" why the district court's "decision not to allow the government's case to proceed on the 'defraud' clause of § 371 was * * * correct." 881 F.2d at 320 n.1. The validity of the dismissal of the defraud clause allegation was not even presented by the defendant's appeal in *Gibson*, and, in any event, that dismissal rested on an independently sufficient ground; thus, the *Gibson* court's reference to *Minarik* also does not constitute a holding that conflicts with the decision in

Even if the exclusivity discussion in *Minarik* is not viewed as dictum, moreover, the scope of the court's exclusivity discussion is far from clear. The opinion includes language suggesting that its analysis may be limited to particular contexts.[11] The facts of this case are entirely different from the facts of *Minarik*: there is no claim that the government has shifted positions; the governmental function alleged to have been obstructed was clearly set forth in the indictment; and the duty not to obstruct the FHBB's oversight of savings and loans is distinguishable from what the *Minarik* court described as a taxpayer's duty not to conceal transactions from the IRS.[12]

To be sure, we believe that the exclusivity discussion in *Minarik* is erroneous, and we recognize that, if that language were applied to this case, it might require reversal of petitioner's conspiracy conviction.

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this case. At least one district court, however, has dismissed a count of an indictment on the basis of *Minarik*. See *United States* v. *Mohney*, 723 F. Supp. 1197 (E.D. Mich. 1989).

[11] See, *e.g.*, 875 F.2d at 1187 ("[T]he 'offense' and 'defraud' clauses *as applied to the facts of this case* are mutually exclusive.") (emphasis added); *id.* at 1194 (discussing "the necessity of treating the offense and defraud clauses as mutually exclusive *in this case*") (emphasis added); *id.* at 1196 ("[W]here the duties of a citizen are as technical and difficult to discern as they are when a taxpayer, before levy, engages in otherwise legitimate activities that may make ultimate collection more difficult, we hold that a Congressional statute closely defining those duties takes a conspiracy to avoid them out of the defraud clause and places it in the offense clause.").

[12] Indeed, the *Minarik* court did not purport to overrule prior Sixth Circuit decisions upholding prosecutions under the defraud clause which involved the objective of impeding the tax collection functions of the IRS. See *United States* v. *Jerkins*, 871 F.2d 598 (1989); *United States* v. *Shermetaro*, 625 F.2d 104 (1980).

Nonetheless, there is no square conflict between the Sixth Circuit and the court below, for two reasons. First, as we have noted, petitioner failed to preserve the exclusivity claim in the district court, and he failed to present that claim in his brief in the court of appeals; presumably for that reason, the court of appeals failed to address the exclusivity claim and thus has not explicitly addressed or rejected the analysis of the Sixth Circuit in *Minarik*. Second, the discussion of the exclusivity claim in *Minarik* was dictum that was unnecessary to the decision in that case, and therefore does not constitute a holding that conflicts with decisions permitting the government to charge a conspiracy to defraud the United States even when the conduct at issue would also violate a specific federal criminal statute. Accordingly, because there is no square conflict between the decision in this case and the Sixth Circuit's decision in *Minarik*, we submit that this Court need not review the issue at this time.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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